

**COMMISSION
APPROVED**

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**FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580**

**BUREAU OF
CONSUMER PROTECTION**

March 19, 1985

Mr. Robert J. Siconolfi
Executive Secretary
New Jersey State Board of Dentistry
1100 Raymond Boulevard, Room 321
Newark, New Jersey 07102

Dear Mr. Siconolfi:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition¹ are pleased to have the opportunity to comment on the Board of Dentistry's proposed rules. Although we support the Board's concern for regulating deceptive advertising practices by dentists, it is our belief that a number of provisions in the proposed advertising rules would restrain truthful communication and thereby inhibit competition. Our primary concern is with section 13:30-8.6 of the proposed rules. We also comment on certain portions of rule 13:30-8.4.

I. Interest and Expertise of the Federal Trade Commission

The Federal Trade Commission is empowered under 15 U.S.C. § 41, et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the kinds of business arrangements that state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others are permitted to use in their respective practices. Our goal is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

¹ These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission. They do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Federal Trade Commission, however, has reviewed these comments and has voted to authorize their submission.

As a part of the Commission's effort to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.² In this regard, studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.³ Studies have also provided evidence that restrictions on advertising raise prices but do not maintain or enhance quality of services.⁴ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a

² See, e.g., In re American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- follows the reasoning of recent Supreme Court decisions involving professional regulation. See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services) and Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

³ Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J. L. & Econ. 337 (1972).

⁴ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); McChesney and Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

decrease in consumer welfare may well result. For this reason, we believe that only false and deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may well contribute to an increase in prices.

II. Disadvantages and Costs of the Proposed Rules

In the summary accompanying its proposed rules, the Board states that the purpose of its advertising provisions is to provide a framework to "improv[e] the quality of information available about a practicing dentist's services and expertise." We applaud this goal to the extent it involves an effort to regulate deceptive advertising. However, as noted below, we believe that certain provisions of sections 13:30-8.4 and 8.6 are unnecessarily broad. As such, they would have the effect of restricting the flow of truthful information to consumers and limiting competition among dental practitioners.

A. Prohibitions on Communication of Price Information

Various provisions of the proposed rules appear to place unnecessarily broad prohibitions or restrictions on the communication of price information. As the Supreme Court has noted in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the lack of such information "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . [professionals] are isolated from competition and the incentive to price competitively is reduced." Id. at 377. The absence of such information "serve[s] to perpetuate the market position of established [parties]." Id. at 378.

Board rule 13:30-8.6(c)(12) would prohibit "any statement offering gratuitous services or the substantial equivalent thereof." In our opinion this provision is unnecessary to protect consumers. To the contrary, truthful advertising of the availability of free services can be of great benefit to consumers and, in addition, such offers can be a valuable promotional tool for new practitioners who are trying to establish themselves. While we are aware that there is a potential for deceptive schemes in the use of such advertising, we believe that a total ban on the offering of free services is overly restrictive and unnecessary.

Proposed rule 13:30-8.6(g) would require that offers of discounts "indicate the fixed or stated range of fees against which said discount is to be made." The restriction would

effectively preclude the advertising of across the board discounts (e.g., "ten percent off dental services") that are directed at specific groups such as students or senior citizens. Since it would be impractical to state in an advertisement the regular prices of all of the goods and services covered by such an offer, the rule would likely suppress certain forms of truthful and valuable advertising and make other forms of nondeceptive advertising more costly. Moreover, the rule has the potential to discourage the offering of any across the board discounts. Because of its potential to have a negative impact on consumers and competition, we suggest that the provision be eliminated.

Finally proposed rule 13:30-8.6(f) states that advertising making references to fees "shall be limited to that which contains a fixed or a stated range of fees for a specifically described routine professional service." The provision appears to prevent the advertising of fee information for nonroutine services, including, for example, new or innovative techniques that are not ordinarily used by practitioners. It also appears to prohibit any advertisements that describe rather than state prices, using language such as "lowest costs" or "as low as." Such terms can be a method of commanding consumer attention and may serve to communicate a message effectively. While we recognize that some advertisers could use such terms in a deceptive manner, they are not facially deceptive. The Board could address abuses under its authority to prohibit "false, fraudulent, misleading or deceptive advertising" (§ 13:30-8.6(c)(1)). Thus, we urge the Board to reexamine the need for this rule as well.

B. Prohibitions on Communication of Nonprice Information

Other portions of the Board's rules in § 13:30-8.6 would appear to prohibit communication of important nonprice information. As in the case of price information, we believe the effect of these prohibitions would be to prevent the communication of information to consumers that could aid them in selecting a dentist. As such, they could inhibit competition.

For example, § 13:30-8.6(c)(2) would prohibit claims that "the service performed or the materials used are professionally superior to that which is ordinarily performed or used," whether or not the statement is true. At a minimum, a prohibition on advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting customers and fostering competition. When sellers cannot compare the attributes of their services to

those of their competitors, the incentive to improve or to offer different products, services, or prices is likely to be reduced.

A ban on claims of superiority is likely to be even more injurious to competition and consumers if interpreted to prohibit truthful claims concerning quality of service. Virtually all statements about a seller's qualifications, experience, or performance can be considered to be implicit claims of superiority, and a ban on all such claims would make it very difficult for a seller to provide consumers truthful information about the differences between his or her services and those of his or her competitors.

Section 13:30-8.6(c)(5) of the Board's rules would prohibit the use of "any personal testimonial attesting to the quality or competence of a service or treatment offered by a licensee," whether truthful or not. As in the case of superiority claims, testimonials are a means for a practitioner to disseminate truthful information, including statements about his or her office equipment, personnel, or techniques and thereby differentiate his or her services from those of other practitioners. Testimonials are widely used in other contexts to communicate consumer experiences with particular products or services. They may be useful in advertising dental services, particularly to attract those consumers who have had little or no contact with dentists. Thus, we believe that both superiority claims and testimonials should be permitted so long as they are truthful and not deceptive.

In rule 13:30-8.4(k) the Board would require that all advertisements and public announcements that a practice specializes in or limits its services to one or more of the eight areas set forth in subd. 8.4(b) list the names and permit numbers of all practitioners licensed to provide these services. Moreover, rule 13:30-8.6(h) would require that advertisements and public representations as to any practice set forth the names of all licensees "who are principals, partners, or officers" in that practice. These provisions would appear to inhibit advertising by high volume practices that have large numbers of dentists. Such practices would face burdensome advertising costs because of the need to list all of their practitioners in promotions. We agree that it is in the public interest for consumers to know the identity of the dentist who is responsible for their care. But this goal could be accomplished more efficiently through several methods less burdensome than the one proposed in the rule. For example, the practice could provide patients with the names of its practitioners when patients arrive for an appointment; or it could post the names of all practitioners in the reception area;

or it could make notations in dental records. These methods would more directly inform patients of the identity of their dentists and would be preferable to the broader approach currently proposed by the Board.

Section 13:30-8.6(d) of the Board's proposed rules states that a licensee is required "to substantiate the truthfulness of any assertion or representation set forth in an advertisement" (emphasis added). If the licensee fails to provide such substantiation, this is deemed "professional misconduct." We believe the provision is overly comprehensive since it would appear to cover both material and non-material representations. As such, it may chill communication of truthful information, without providing any benefits to consumers. In our opinion the problem can be cured by the insertion of the word "material" after "any."

C. Vague and Subjective Standards

The proposed rule sets forth two broad standards under which the Board would evaluate the overall content of an advertisement. Rule 13:30-8.6(b) states that advertising must be communicated "in a dignified manner." Rule 13:30-8.6(c)(11) states that a licensee who advertises in a format "which appears to be essentially non-informational in nature and used primarily to gain attention" is guilty of professional misconduct.

We have two concerns regarding these provisions. First, they set forth vague criteria that are susceptible to subjective interpretations that have nothing to do with the truth or falsity of particular statements in advertisements. As such, the standards may serve to chill the communication of nondeceptive information. Secondly, the provisions may be construed to inhibit the use of innovative advertising and marketing techniques commonly used by other providers of goods and services. Techniques may be characterized as "non-informational" or "undignified" and yet be useful to advertisers to attract and hold consumers' attention. Thus, they can help to communicate messages more effectively to consumers. The techniques the Board seeks to prohibit are not inherently deceptive and prohibiting them may well decrease the effectiveness of advertising, resulting in higher costs and less frequent advertising. For these reasons, we believe the Board should reconsider the need for these provisions.

D. Other Restrictions

In § 13:30-8.6(e) the Board prohibits practitioners from "engaging either directly or indirectly or through the use of any agent, employee or representative in in-person solicitation with a prospective patient or consumer." We understand the Board's concern that in certain circumstances an in-person solicitation may be conducive to overreaching. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 464 (1978). However, in its present form, the Board's rule appears to be unnecessarily broad. It prohibits indirect as well as direct solicitation; it also bars use of representatives acting on behalf of a practitioner. Thus the provision can be construed to prohibit a wide variety of relevant, truthful information, such as distribution of business cards or mass mailings, that would not be conducive to overreaching. We recommend that the first section of the subdivision be revised to read as follows: "A board licensee shall not engage in uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence." See AMA, 94 F.T.C. at 1037-1038.

In rule 13:30-8.6(c)(7) the Board would prohibit "offers to give, receive or accept a fee or other consideration to or from a third party for the referral of a patient." Among other effects, the rule would appear to prevent dentists from participating in legitimate referral services that charge a fee for participation. Such services may be valuable in helping consumers locate appropriate dental care. By facilitating the gathering of information by consumers, they may increase competition among health care professionals. In addition, the proposed rule may also prohibit commissions in other circumstances where they may be appropriate.

We also have concerns about § 13:30-8.4, subds. b, c, and e of the Board's former rules. According to the notice of readoption, these provisions will be incorporated in the new rules. The provisions prohibit dentists, who are not certified or eligible for certification by an American Dental Association specialty board or who do not meet educational requirements and standards approved by the Board, from advertising that their practices are limited to eight specifically listed specialties. We can appreciate the Board's desire to prevent dentists from holding themselves out as specialists in an area where they lack necessary competence. The Board's rule, however, appears to be overly broad. It restricts dentists to announcing only the eight areas of specialization set forth in the rule; it therefore would prevent dentists who may be specialists in areas other than the

eight specified from advertising that fact. In addition, it appears to require that only those particular names for specialties denominated in the rule be used. These limitations may restrict the flow of relevant, truthful information. See In Re R.M.J., 455 U.S. 191, 205 (1982). We also urge the Board to reconsider whether it is necessary to prevent general dentists who, according to subdivision (g) of the rule may provide specialized services, from announcing in a non-deceptive manner the services they in fact provide.

Finally, we note that the Board in rule 13:30-8.6, subds. k and l, would require licensees to retain copies of all advertisements for a period of three years. We believe that such a lengthy period may be unreasonably burdensome for a practice that advertises frequently and therefore suggest that the Board adopt a shorter record retention requirement.

III. Conclusion

We thank you for your willingness to consider our comments. As a general matter, we believe that the Board's advertising standards should be directed only at those specific forms of promotion which are "inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive," R.M.J., 455 U.S. at 202. Measured by this standard, a number of the Board's proposed rules appear to be overly broad and therefore restrictive of truthful as well as deceptive communications. The rules are likely to have an adverse effect on competition and on consumer welfare. As noted in this letter, we believe they should be eliminated or modified in favor of rules which are more narrowly focused on deceptive advertising practices.

We have referred to a number of studies in this letter. We will be happy to supply a copy of any of these if you so desire. Please let us know if we can be of further assistance.

Sincerely,


Carol T. Crawford
Director